

**Before the  
Federal Communications Commission  
Washington, DC 20554**

<b>In the Matter of</b>	)	
	)	
<b>Amendment of Parts 1, 21, 73, 74 and 101 of the</b>	)	<b>WT Docket No. 03-66</b>
<b>Commission's Rules to Facilitate the Provision of</b>	)	<b>RM-10586</b>
<b>Fixed and Mobile Broadband Access, Educational</b>	)	
<b>and Other Advanced Services in the 2150-2162</b>	)	
<b>and 2500-2690 MHz Bands</b>	)	
	)	
<b>Part 1 of the Commission's Rules – Further</b>	)	<b>WT Docket No. 03-</b>
<b>67</b>		
<b>Competitive Bidding Procedures</b>	)	
	)	
<b>Amendment of Parts 21 and 74 to Enable</b>	)	<b>MM Docket No. 97-217</b>
<b>Multipoint Distribution Service and the</b>	)	
<b>Instructional Television Fixed Service</b>	)	
<b>Amendment of Parts 21 and 74 to Engage in Fixed</b>	)	
<b>Two-Way Transmissions</b>	)	
	)	
<b>Amendment of Parts 21 and 74</b>	)	<b>WT Docket No. 02-68</b>
<b>of the Commission's Rules with Regard to</b>	)	<b>RM-9718</b>
<b>Licensing in the Multipoint</b>	)	
<b>Distribution Service and in the</b>	)	
<b>Instruction Television Fixed Service for the</b>	)	
<b>Gulf of Mexico</b>	)	

**To: The Commission**

**REPLY COMMENTS  
OF  
AD HOC MMDS LICENSEE CONSORTIUM**

**The Ad Hoc MMDS Licensee Consortium ("AMLC") is a group of MDS and MMDS licensees who have held their licenses for many years. It includes Channel 1 and 2 licensees who were involved in the industry from its inception, licensees who acquired MMDS licenses in lotteries or the aftermarket, and BTA licensees who bought their**

licenses in the 1996 auction. This Reply Comment addresses certain comments of Clearwire Corporation with respect to the build-out requirements of BTA license holders, and, more generally, the Commission's proposal to effectively strip BTA holders of their licenses for areas which were not built out as of July 29, 2004.

Under former section 21.930 of the Commission's rules, BTA holders had five years to construct stations with sufficient signal coverage to reach at least two-thirds of the population of the applicable service area, excluding population within the protected service areas of incumbents. This rule had always been problematic because in many cases the vast majority of the population of a BTA was within the PSA of incumbents. The remaining population was spread thinly around the fringes of the incumbents' core service area and it was therefore difficult, if not impossible, and certainly financially infeasible, to serve these fringes of population. As early as 1998, members of AMLC had alerted the Commission's staff to this anomaly. There was, in addition, considerable uncertainty about how the rule was to be applied (*e.g.*, did the requisite coverage have to be provided over *all* channels held by the BTA licensee or just some of them?) On top of this, the continuing uncertainty surrounding the MDS/ITFS spectrum made service roll-outs impractical in the late 1990's and early 2000's. For that reason, the Commission first extended the build-out deadline for two years, generally giving BTA licensees until August 16, 2003 to complete build-outs. *Extension of the Five-year Build-out Period for BTA Authorization Holders in the Multipoint Distribution Service*, 16 FCC Rcd. 12593 (2001). Then, in the current docket, the Commission extended the deadline across the board pending the completion of the overhaul of this band. *Amendment of Parts 1, 21, 73,*

*74 and 101 of the Commission's Rules to Facilitate the Provisions of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, Notice of Proposed Rulemaking, WT Docket No. 03-66, 18 FCC Rcd. 6722 (2003).* The Commission expressly proposed at that time to give BTA license holders some additional time to complete their build-outs once the rulemaking was completed. *Id.* at Para. 200.

Under these rulings and given the economic climate and regulatory uncertainty that prompted the rulings, many BTA holders did not comply with the now discarded requirement of 21.930. Other BTA holders actually have complied with the requirement but did not file the certification of completion because they were awaiting clarification from the Commission on how the demonstration was to be made. Since there was no requirement to file such a certification at the time, this was perfectly proper and understandable for both categories of BTA licensees. The proposal of the Commission at Paragraph 299 of the NPRM is that BTA licensees should now effectively be penalized for not complying with a build-out deadline which was not operative at the time.

Under the Commission's proposal, in non-transitioned markets, the licenses of BTA holders would be automatically modified so as to become site-based licenses limited to the areas built out as of July 29, 2004. Such a modification would work a gross and wholly unwarranted forfeiture on licensees who were planning construction in accordance with the FCC rules which were in effect over the last ten years. In the case of some AMLC members, they have been duly paying for their licenses on a quarterly basis since 1996 or 1997, awaiting the proper business climate in which to attempt to provide initial

service. They were fully entitled to do this under the rules of the Commission. Under the Commission's present proposal, however, these licensees would lose their entire BTA – they would have no license and no bidding credit since they would not have built out their systems prior to 2004, even though they were under no obligation to do so. To make the situation even more outrageous, not only would they experience a complete forfeiture of their licenses, but in many case they are still paying installment notes for the licenses. The Commission would therefore not only strip them of their licenses but continue to make them pay for them afterwards! Even BTA holders who had engaged in some partial build-out would still lose the rights to the remainder of their BTAs.

This proposal is unjust and unlawful on so many levels it is difficult to begin. First, there is the fundamental unfairness of stripping licensees of licenses when they have fully complied with all pertinent rules governing those licenses. The Commission has expressly recognized that there were ample reasons for the licensees not to have built out their systems prior to 2004 and they were therefore duly excused from that obligation. For the Commission to now retroactively penalize them is grossly unjust. If the Commission was contemplating some sort of forfeiture of licenses to occur, it should at a minimum have given the licensees fair warning so they could go ahead and build the systems out, no matter how uneconomical that might have been, in order to save their licenses.

Second, the Commission sold these licenses to the licensees in the 1996 auction and they were purchased in good faith subject to the rules in effect at that time and as subsequently modified to delay the construction deadline. The bargain between the

Commission and the auction winners was that they would have the full rights to the unencumbered (or subsequently freed up) spectrum in their BTAs, subject to stated requirements to complete construction. To retroactively require a build-out to have occurred by a not previously known date on pain of license cancellation is not only the purest form of unlawful retroactive rulemaking, *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), but also violates the Fifth Amendment's takings clause. Any license forfeiture imposed under these conditions would almost certainly subject the Commission to significant liability for taking these licenses without compensation – as it should. Because of the severity of the forfeiture, the lack of any warning, and the sheer unjustness of the situation, this would make a perfect test case to establish the bounds of the Commission's ability under the Fifth Amendment to adversely modify licenses issued by auction.

Third, as noted above, in many cases the licenses are not even fully paid for yet. Would the Commission really expect licensees to continue making the payments on licenses which had been taken from them under these circumstances? The Federal Trade Commission might have to be called in to prevent so unfair a trade practice.

Fourth, even the pendency of this proposal puts an absolute chill on the incentive of BTA licensees to build out their systems now. Such licensees now have no assurance that their licenses will not be taken away, regardless of any post July 2004 construction. This immediately makes any financing or customer roll-outs effectively impossible since there is no assurance that the licensee will be able to continue to serve that territory in the future. With a few strokes of the pen the Commission has stopped the potential rollout of

**unserved BTA areas in its tracks until the NPRM is resolved.**

**Fifth, as noted above, there was legitimate confusion about how the build-out requirement was supposed to apply, confusion which the Commission did not clarify years ago and which it should have clarified in the instant Docket. Licensees should not be penalized for not complying with a rule that was confusing and virtually impossible to comply with in the first place. The Commission's proposal at paragraph 299 should be rejected in its entirety as both unlawful, unfair and bad policy.**

**The best way to handle BTA licenses in unbuilt or partially unbuilt BTAs for purposes of modifying licenses and issuing bidding credits in untransitioned markets is to either (a) fully credit the BTA holders with whatever license rights they have throughout the entire BTA or (b) establish new build-out requirements that realistically take into account the coverage of incumbents in the market and then give BTA holders a reasonable time to satisfy whatever those requirements are.**

#### **CLEARWIRE'S COMMENTS**

**At pages 15-18 of its Comments Clearwire Corporation suggests that a standard similar to that imposed by former Section 21.930 of the rules should apply on a going forward basis. Significantly, Clearwire, in its citation to the pertinent rule, elides the part that excludes from coverage consideration the population within the service area of incumbent licensees. But it is that part of the rule that made, and will make, compliance so difficult, not even counting the other economic uncertainties which have beset the industry. Clearwire also suggests that "in many BTAs," the section 21.930 build-out requirements were met and certifications filed. Clearwire does not provide the source of**

this information. AMLC does not know of any build-out certifications that have been filed. Moreover, given the requirement of the rule that two-thirds of the population in a BTA outside the incumbents' service area must have been served, we would be very surprised if *anyone* has met that standard, except in situations where there were no licensed incumbents. As a recent buyer of many MDS BTA licenses, we believe that Clearwire would stand to lose many of the licenses it just bought if the Commission's proposal is adopted to apply retroactively to BTA licensees. Moreover, as we have indicated, even on a going forward basis, the 21.930 standard is not a useful, practical or fair method of measuring the provision of service to the public. This is a standard that would either not be met at all, or would only be met by contorted service plans designed to achieve coverage of disparate wisps of BTA population rather than areas where real needs are identified.

Clearwire is legitimately concerned about warehousing, but the safe harbors proposed by many commenters for renewal evaluation are more than adequate to prevent warehousing and ensure that the licenses are put to good use as soon as the rules settle down.

Respectfully submitted,

Ad Hoc MMDS Coalition

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